

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
TEMPE RADIO, INC.)	File No. EB-02-IH-0812
)	NAL Account No. 200432080006
Licensee of Station KUPD(FM),)	Facility No. 65166
Tempe, Arizona)	FRN No. 0007589328
)	
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 6, 2003**Released: October 7, 2003**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that, on October 3, 2002, Tempe Radio, Inc. ("Tempe"), licensee of Station KUPD(FM), Tempe, Arizona, apparently willfully violated Section 73.1206 of the Commission's rules.¹ Based upon our review of the facts and circumstances in this case, and for the reasons discussed below, we conclude that Tempe is apparently liable for a monetary forfeiture in the amount of Four Thousand Dollars (\$4,000.00).

II. BACKGROUND

2. The Commission received a complaint that, on October 3, 2002, Station KUPD(FM) broadcast a telephone conversation between radio personality Beau Duran and Flynn Kile, the then-recently widowed wife of St. Louis Cardinals' baseball pitcher Darryl Kile.² According to the complaint, Mr. Duran called Ms. Kile, who was visiting Phoenix, Arizona, to attend the St. Louis Cardinals-Arizona Diamondbacks playoff game. Mr. Duran told Ms. Kile that she was "hot," asked her whether "she had a date for Thursday's game," and broadcast the conversation without informing Ms. Kile that the conversation was being aired.

3. After reviewing the complaint, we issued a letter of inquiry to Tempe.³ We asked the licensee whether Station KUPD(FM) had broadcast a telephone conversation or had recorded and later replayed such a conversation between Mr. Duran and Ms. Kile, and whether station personnel had provided Ms. Kile prior notification that they intended to air the conversation. Additionally, we asked the licensee to provide any other pertinent details that would explain or clarify the matter.

¹ 47 C.F.R. § 73.1206.

² See Letter from Matthew O'Brien to Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (October 15, 2002).

³ See Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Tempe Radio, Inc. (November 15, 2002).

4. In its response to our letter of inquiry,⁴ Tempe admitted that Station KUPD(FM) broadcast live the conversation between Mr. Duran and Ms. Kile, on October 3, 2002. Tempe stated that “the entire broadcast of the telephone call, including a brief exchange with the hotel operator, lasted less than 45 seconds,” that “Mr. Duran’s conversation with Ms. Kile lasted less than 25 seconds,” that the conversation was not rebroadcast, that Mr. Duran had initiated the call and that he was the only station employee to speak with Ms. Kile. Tempe further admitted that Mr. Duran never gave notice that the telephone conversation would be or was being aired. As a result of the October 3 broadcast, Tempe stated that on October 4, 2002, it suspended Mr. Duran, that on October 7, 2002, it terminated his employment and also circulated a memorandum reminding its employees of the requirement to inform parties that their conversation will be simultaneously broadcast or recorded for later broadcast and warning them that violation of this requirement would result in “immediate termination.”⁵ In reply, the complainant claimed that Tempe had terminated Mr. Duran only because of the “public outcry” and ensuing notoriety the broadcast engendered, and that its “efforts to adhere to FCC Rules seems to have begun seriously only after [his] complaint to the FCC and [our] subsequent letter” to Station KUPD(FM).⁶

III. DISCUSSION

5. Under section 503(b)(1) of the Communications Act of 1934, as amended (the “Act”),⁷ any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁸ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁹ As we set forth in greater detail below, we conclude under this standard that Tempe is apparently liable for a forfeiture for its apparent willful violation of section 73.1206 of the Commission’s rules.

6. Section 73.1206 of the Commission’s rules provides, in pertinent part:

⁴ In accordance with a staff-granted extension of time, on December 20, 2002, Tempe filed its response. See Letter from Chuck Artigue, Vice President and General Manager, KUPD(FM) to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (December 20, 2002).

⁵ *Id.* at 2.

⁶ See Letter from Matthew O’Brien to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (January 9, 2003).

⁷ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

⁸ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁹ See, e.g., *SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

Before recording a telephone conversation for broadcast . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as as [sic] employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

Thus, Section 73.1206 requires licensees to so notify parties to a telephone call *before* it initiates recordings for simultaneous or later broadcasts. The Commission has stated that “[t]he recording of such conversation with the intention of informing the other party later – whether during the conversation or after it is completed but before it is broadcast -- does not comply with the Rule”¹⁰ The rule reflects the Commission's longstanding belief that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoidance of nonconsensual broadcasts of their conversations.¹¹ Thus, the Commission has held that the prior notification requirement ensures the protection of an individual's “right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station” live or by recording for delayed airing.¹² Applying this reasoning, the Commission has defined “conversations” broadly “to include *any* word or words spoken during the telephone call,” and specifically has rejected arguments that “utterances made by parties called in answering the phone” are not subject to the rule's prior notification requirement.¹³

7. Based upon the information before us, it appears that, on October 3, 2002, Tempe broadcast the conversation between Mr. Duran and Ms. Kile, without providing Ms. Kile prior notice that it intended to air her conversation, in apparent willful violation of Section 73.1206 of the Commission's rules. In light of this apparent violation, we believe it appropriate that Tempe be assessed a monetary forfeiture. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000.00 for the unauthorized broadcast of a telephone conversation¹⁴ and provides that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) and 1.80(a)(4), which include “the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁵ Based upon the facts and circumstances presented here, we find that the base amount of Four Thousand Dollars (\$4,000.00) to be the appropriate proposed forfeiture amount.

¹⁰ *Station-Initiated Telephone Calls which Fail to Comply with Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972) (“1972 Public Notice”).

¹¹ *See Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) (“1988 Order”); 1972 Public Notice, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); *see also EZ Sacramento, Inc. and Infinity Broadcasting Corporation of Washington, D.C.*, 16 FCC Rcd 4958, 4958 (2002) (finding that prior notifications “effectively cease” when callers are put on hold, and that thus explicit notice must be given if stations plan to continue such broadcasts or record such conversations for later broadcasts); *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC 1005, 1006 (1975) (finding that “cash call” promotions that simultaneously broadcast, and award prizes based on, parties' responses in answering the telephone are subject to section 73.1206's prior notification requirement) (emphasis added).

¹² 1988 Order, 3 FCC Rcd at 5463.

¹³ *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC at 1006.

¹⁴ *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁵ *Id.*, 12 FCC Rcd at 17100-01.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹⁶ and Sections 0.111, 0.311 and 1.80 of the Commission's rules,¹⁷ Tempe Radio, Inc., licensee of KUPD(FM), Tempe, Arizona, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of Four Thousand Dollars (\$4,000.00) for willfully violating Section 73.1206 of the Commission's rules on October 3, 2002.¹⁸

9. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the rules,¹⁹ within thirty (30) days of this NOTICE OF APPARENT LIABILITY, Tempe Radio, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) referenced above and also must note the NAL/Acct. No. referenced above.

10. The response, if any, must be mailed to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

11. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁰

12. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

¹⁶ 47 U.S.C. § 503(b).

¹⁷ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

¹⁸ 47 C.F.R. § 73.1206.

¹⁹ 47 C.F.R. § 1.80.

²⁰ 47 C.F.R. § 1.1914.

13. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to Chuck Artigue, Vice President and General Manager, KUPD(FM), 1900 W. Carmen, Tempe, Arizona 85283, and to Kenneth C. Howard, Jr., Esquire, Baker and Hostetler, LLP, 1050 Connecticut Avenue, N.W., Suite 1100, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

Attachment A

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	1,500 Employees or Fewer
Broadband Personal Communications Services (Blocks A, B, D, and E)	
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	

Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer

Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)